Office Supreme Court
FILED
OCT 9 1902
JAMES H. McKENNEY,

No. 89.

Br. of Turley & Heiskell for Pet. (on

Filed Oct. 9, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

E. M. AYRES, Plaintiff in Error,

vs.

JNO. H. POLSDORFER AND WIFE, Defendants in Error.

Motion and Petition for Certiorari.

THOS. B. TURLEY AND
J. B. HEISKELL,
Attorneys for Petitioner, E. M. Ayres.

S. C. TOOF & CO., PRS. & LITHS. MEMPHIS

In Supreme Court of the United States.

E. M. AYRES, Plaintiff in Error,

vs. } No. 310

JOHN H. POLSDORFER AND WIFE, Defendants in Error.

MOTION.

Comes the plaintiff in error and moves the court to grant unto him the writ of certiorari in order to bring this case from the Circuit Court of Appeals to this court, that the action of that court may be reversed and the case decided on the merits, to the end that right and justice may be done in the premises.

He prays the court for this writ upon the grounds set forth in the petition here following, and he asks the court to allow him in support of this motion and petition to use the briefs of his counsel and record now on file in this court on his writ of error.

T. B. TURLEY AND
J. B. HEISKELL.

PETITION.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of E. M. Ayres respectfully represents to your Honors that on the —— day of April, 1901, he obtained upon the fiat of the Hon. Justice Harlan of this court a writ of error to bring before this court the record and proceedings of the Circuit Court of Appeals for the Sixth Circuit of the United States in the case of petitioner E. M. Ayres, plaintiff

in error, v. John Polsdorfer and Wife, defendants in error, and that by way of return to said writ, a copy of the said record and proceedings was filed in this court and the cause regularly stands upon the docket of this court as No. 310, to be reached in due course for trial about the middle of November of the ensuing October term of this court.

That on the 9th day of September, 1902, petitioner's counsel received notice that on the 20th day of October, 1902, in said term, or as soon thereafter as the same can be entertained, the defendants in error will move the court to dismiss the said writ of error. The motion is accompanied by a brief which alleges for reason that petitioner has mistaken his remedy, and should have resorted to the remedy by certiorari, if he was entitled to any remedy whatever. And in consequence of the said notice and brief, petitioner is advised that it is necessary for him, for further security of his position in this court, to ask the aid of this court by granting him a writ of certiorari under the discretionary powers conferred upon this court in that behalf, to bring the said cause into this court, so that in case the court shall be of the opinion that the said writ of error was not the proper remedy in this behalf, the petitioner shall not be wholly deprived of his rights by reason of a misconception of his proper remedy.

Petitioner states that the writ of error by which the case was brought into the Circuit Court of Appeals was dismissed on the hearing in that court without any trial on the merits, because this petitioner had not joined with him in the said writ of error, one Price, who was sued in the same action of ejectment with this petitioner. That petitioner had in no manner any connection with the said Price, in act, or claim, or interest. That on the contrary, his claim was adversary to that of said Price to the same extent that it was to that of Polsdorfer. That petitioner claimed title to the property as land lying in the State of Arkansas, while the said Polsdorfer

and Price both claim the same under grants from the State of Tennessee. That the petitioner could not therefor assign the errors against Price as errors affecting him, and that Price could not assign the errors which affected petitioner as prejudicial to him, when in fact they were in the main to his advantage. Upon this ground of non-joinder of a party having no joint or common interest which could be severed, and for want of summons and severance of what had no link, or ligation, to give them any connection whatever, and upon this cause alone, petitioner was turned out of court, and the court refused to review or consider the many errors in the proceedings of the court below or to reverse the same.

Petitioner is advised that the rule thus misapplied is held by the said Court of Appeals, as appears by the opinion of the court filed in said court, transcript p. —, to be a matter which goes to the jurisdiction of that court, and that by reason of said non-joinder the jurisdiction of said court failed to attach. Petitioner is advised that to define the jurisdiction of that court is one of the class of cases so important in its character that it strongly demands of this court to exercise its revisory jurisdiction, and appeals to the discretionary power of the court in using the writ of certiorari.

Petitioner further states that there are already numerous reported decisions of the various Circuit Courts of Appeals on the subject of the non-joinder of plaintiffs in error in which conflicting decisions have been rendered, and he is advised that in the interest of uniform practice it has been held by this court, that its power to grant the writ of certiorari ought to be exercised.

Petitioner is advised further that the decision of the said Court of Appeals is directly in disregard of the holding of this court in the case of Hanrich v. Patrick, 119 U. S. 156, in which it was held that the joinder of defendants adversely interested in an ejectment suit was not necessary or proper,

and he submits that such disregard for the solemn adjudication of this case, is a cogent reason for the exercise of the discretion of the court in granting the writ of certiorari.

Petitioner is advised that a rule of practice by which a party with a meritorious cause may be deprived of his freehold, and which is frequently invoked, as here, to evade justice, is a matter of such consequence to the administration of justice, as appeals strongly to this court to guard against its misapplication, by resort to the remedy by certiorari.

Petitioner further states that the writ of error granted in this case from this court was applied for and granted upon the ground that there was other ground for jurisdiction in the Circuit Court of the United States than the diverse citizenship of the plaintiff below and this defendant—in that, the title was claimed under grants from different States. This ground is true; but defendant in error here now insists that a tax title from the State of Arkansas as based upon a United States grant of the land as Arkansas land, is not a grant.

Petitioner is advised that this contention is rather specious and technical than sound—and that whatever passes the title to a freehold is a grant within the true meaning and intent of the Constitution of the United States, and the laws passed thereunder giving jurisdiction to the courts of the United States. But however this may be held, he is advised that the purpose and policy of said provision is to provide against the collisions likely to ensue between contiguous States in regard to the lines and boundaries between them, and if this claim is not expressly within the provisions of the act establishing the Circuit Courts of Appeals as to grounds of jurisdiction, they are so entirely within the policy of those provisions that they present a ground for the exercise of this discretion to grant a certiorari such as is imperative on the court, to prevent the disastrous conflicts of jurisdiction between States, by settling all contests likely to involve them in such conflicts. In this

case the Circuit Court of the United States is a substitute for the State court of Tennessee. Its authority was and is in such cases precisely that of a State court. The judgment of the court of Tennessee, if rendered by the State court, would be executed by a State officer. If he should be met by an officer of the State of Arkansas executing a process in favor of petitioner requiring him to put petitioner in possession, it would be likely to occasion a conflict, and it seems that the provision as to titles emanating from different States was contrived and inserted to meet and prevent such a possibility.

Petitioner is advised that such a view of the purpose and policy of the Constitution imposes upon this court the highest obligation to use the means beneficently placed within its reach by the provision for the writ of certiorari, to avoid all temptations in the coterminous States to conflicts of jurisdiction and of executive officials, by requiring decisions on the merits in all proper cases in which such questions arise, as to conflicts of the title and boundary of States, on a full investigation as to the boundary and title, and calls upon the court to use its supervisory powers to the fullest extent to prevent such conflict.

Is this then a proper case on the merits?

It appears in this record that the land in controversy consists of an island and its accretions. The island existed in 1823, when the United States surveyed the land as part of what afterward became the State of Arkansas. R. 192, ans. 10. At that time the Mississippi ran on both sides of the island, the widest portion separating it from Arkansas, but the main body of the river ran between it and the Tennessee shore. R. 191, ans. 6.

In 1837 Tennessee granted the body of the land claimed by Polsdorfer, 5000 acres, calling for "a stake on the bank of the main channel of the Mississippi river." R. 13. At that time and until the great freshet of 1839 or 40—not fixed pre-

cisely—the boating channel ran where petitioner claims the State line of Tennessee to be, and was the main channel called for in the Polsdorfer grant. R. 191, 232, ans. 7–8; 232 (16.) In that great freshet the river deserted the old main channel on the east side of this island and made its main channel on the west side of the island. R. 191, ans. 8–9.

The record at p. 230, 231, shows the United States issued two patents, one to D. Hardiman, 1st February, 1843, and one to J. C. Barnes, May 12, 1847, to the island as an island in the Territory of Arkansas as being fractional sections 17 and 18, to said Hardiman, and sections 19 and 20, to said Barnes. The record, p. 232, shows in a book in the clerk's office of Mississippi county, Arkansas, that Hardiman entered the land in 1836 and Barnes in 1846. The land was occupied and used by the grantees and others under them as citizens of Arkansas. It was sold for taxes as Arkansas land and petitioners grantor bought it. R. 149, 172. They paid taxes in Arkansas, and there is an overwhelming preponderance of evidence that the same island exists at the present day, and is the land claimed by Polsdorfer as accretion to his Tennessee land. The contention of petitioner was in the circuit court that the accretion was to the island. The record shows beyond a doubt that the accretions were to the island by the greater number and credibility of the witnesses, by the trees with more than fifty years of growth, by the shape and formation of the accreted land, by the exercise of jurisdiction by the State of Arkansas uninterrupted until after the war between the States, by the United States entries, by the collection of taxes proved by the tax collector orally, by the sale of the land for taxes in the Arkansas court after the war, by the map of the public lands in the Land Office at Little Rock, by the map of Mississippi county in the clerk's office of that county, by the testimony of persons who lived on the land, hunted on it, fished from it, slept on it, hid from the Federal soldiers on it, cut wood

on it; by the fact that refugees from Tennessee harbored on it and defied Tennessee officers, and that the officers submitted. R. 98. By repeated decisions of Tennessee courts that petitioner was the owner of the timber cut from it and sold in Tennessee (Rec. 202–6, 227), by the admission of Joe Marley, Polsdorfer's immediate grantor; operating in Tennessee as an estoppel to bar his right—by his refusal to warrant title to the land as accretion to the 5000 acres. R. 35. While on the part of Tennessee no claim of jurisdiction was ever asserted, until Price and Roy obtained grants from the State on entries made in the entry taker's office of Lauderdale county, on which a grant issues of course.

With this weight of evidence to support petitioner's claim, the district judge took the case from the jury and instructed them to find for the plaintiff. Petitioner is advised that there was not only evidence to be left to the jury, but evidence to have imperatively required the district judge to grant a new trial had the case been left to the jury, and had they found for the plaintiff.

The action of the district judge can be accounted for only upon the ground that he attributed some mysterious virtue to the word "*avulsion.*" A reference to the record will show, p. 258, that he wrote and filed an opinion in which he states "there is not a particle of evidence of avulsion, and therefore the increment belongs to Polsdorfer as riparian owner."

Petitioner is advised that the change in the bed of the river from the east to the west side of the island, was not an avulsion, but it was certainly a change which did not affect the territorial claim of the State of Arkansas or the title of the petitioner.

There is one witness whose deposition was read and is in the bill of exceptions who states that the island was swept away after the change of the main body of the river to the west side; but if he means any more than that the original

nucleus of the 250 odd acres was washed away, the testimony is irresistible which contradicts him; and even if this is what he means, the weight of the evidence is against him. While the evidence of the continuous existence of the island, including in that term its accretions, has no appreciable contradiction.

Petitioner is therefore advised that the land sued for by defendants in error is land in the State of Arkansas, though now in low water joined in various places to the Tennessee shore. It is not Tennessee territory, and not being in Tennessee or within the Sixth Circuit, the said circuit court at Memphis had no local jurisdiction to try and adjudge the title; and that the courts of the State of Arkansas or the Circuit Court for the Eastern Division of the Eastern District in Arkansas as a substitute *pro hac vice* for a court of Arkansas, alone could try and determine the controversy in this case.

That the land is the property of petitioner, and certainly not the property of the said Polsdorfer, and upon the cause being tried in this court on the merits or being reversed on the error of the Court of Appeals, he is entitled to have the case reversed and sent back to the circuit court at Memphis for a new trial.

Petitioner, therefore, if he has mistaken his remedy by writ of error, prays that this court will now grant him a writ of certiorari to bring the case (*de jure* as well as *de facto*) into this court, that right and justice may be done in the premises. And since the record is already here printed and filed, and the case will be presently reached on the hearing docket of this court, he prays that the court will treat the said transcript so returned to the writ of error as a return to the said writ of certiorari, and that the said motion of the said defendants in error to dismiss may be heard with the cause on the merits together with the motion for certiorari.

Am. Sug. Ref. Co. v. New Orleans, 181 U. S. 377–383.

Your petitioner states that the objection to the delay in applying for this relief ought not to prevail against his claim; that he has been guilty of no failure of diligence; that his application for relief was prompt and in proper time; that his mistake, if such it be, is no fault of his, but merely an error in the judgment of counsel; that it has resulted in no delay beyond what would have occurred by obtaining the admittedly proper remedy at the proper time; that the defendant in error, if he cared for the matter of delay, could have made his motion on the first day of the October term, 1901, and that by delaying to make the motion with a view to obtain an advantage of lapse of time as a bar to the remedy now asked for, he has precluded himself from now taking that objection; that the delay has operated in no manner to the prejudice of defendants in error as the case will stand for hearing and be tried on the writ of error exactly at the time that it would have been, if this remedy had been pursued when the writ of error was—and so, as there is no peremptory bar, and it is matter within the sound discretion of the court to decide whether the application is within time, he prays the court that it will not hold him to have lost his right by a merely nominal delay, but that the court will grant the writ as herein prayed for.

In support of his petition he prays the court to allow him to file and use herewith the briefs and record already on file in support of his writ of error.

T. B. TURLEY AND
J. B. HEISKELL.